APPELLANT PRO SE:

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ATTORNEYS FOR APPELLEE:

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IN THE COURT OF APPEALS OF INDIANA

MARC STULTS,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 48A02-0902-PC-166
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick A. Spencer, Judge
Cause No. 48C01-9808-CF-208
48C01-0808-PC-506

September 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Marc Stults appeals the denial of his petition for post-conviction relief. We affirm.

Issue

Stults raises five issues, which we consolidate and restate as whether he received ineffective assistance of appellate counsel.

Facts

The relevant facts are:

> [O]n August 31, 1998, Stults picked up his girlfriend D.B.-D. and her two-year-old daughter, R.B. Together, they travelled by car to a few different places, and several times B.-D. asked Stults to take her home. However, Stults refused to take her home or let her leave. At one point, while the three were in Middletown, B.-D. tried to leave with R.B. Stults told B.-D. that she was not going anywhere and started hitting her. B.-D. hit back, and Stults picked her up and threw her onto the car. B.-D. suffered pain from this altercation. Subsequently, at Stults's uncle's trailer, B.-D. consented to having sex with Stults because she believed that Stults would take her home afterward. R.B. was put on the floor to play nearby.
>
> While Stults and B.-D. were engaged in intercourse, R.B. attempted to climb into the bed with them, and Stults lifted R.B. and showed the child his penis inserted in B.-D.'s vagina, saying "watch this." R.B. became hysterical and B.-D. told Stults that she no longer wanted to have intercourse. Stults then told B.-D. that he was going to rape her. He pinned her to the bed and told her that no one would hear her screaming. During the struggle, B.-D. bit Stults's arm and pushed him off of her. B.-D. was then lying sideways on the bed when she felt an intense pain in her rectum radiating up to her abdomen. She stated that it felt like someone had put a pipe in her rectum. She felt something go into her rectum a second time and experienced still worse pain.
>
> Upon hearing screams, a neighbor called the police, who arrived shortly thereafter and brought B.-D. to the

> hospital. B.-D. was bruised on her arms, legs, back, wrists, and rectum. She had a laceration inside her rectum and was bleeding in the rectal area. The laceration was likely caused by a blunt force trauma.

Stults v. State, No. 48A04-9902-CR-58, slip op. at 2-3 (Ind. Ct. App. Oct. 12, 1999).

The State charged Stults with Class B felony rape, Class A felony criminal deviate conduct, Class D felony criminal confinement, and Class A misdemeanor battery. On October 23, 2008, a jury found Stults not guilty of the rape charge and guilty of the remaining charges. Stults was represented by attorney Montague Oliver during the trial. Oliver filed a direct appeal arguing that trial court improperly refused to allow Stults to cross-examine B.-D. regarding her prescription medications, that the prosecutor made improper remarks during closing argument, and that the trial court improperly allowed the State to amend the battery charge. On October 12, 1999, a panel of this court affirmed Stults's convictions. Id. at 11.

On January 31, 2000, Stults filed a petition for post-conviction relief. After several amendments of Stults's petition, a post-conviction relief hearing was held on August 29, 2008, at which Oliver testified. On January 20, 2009, the post-conviction court denied Stults's petition. Stults now appeals.

Analysis

Defendants whose direct appeals have been rejected are permitted to raise a narrow set of claims through a petition for post-conviction relief. Pruitt v. State, 903 N.E.2d 899, 905 (Ind. 2009) (citing Ind. Post-Conviction Rule 1(1)). The scope of the relief available is limited to issues that were not known at the time of trial or that were

not available on direct appeal. Id. "Issues available but not raised on direct appeal are waived, while issues litigated adversely to the defendant are res judicata." Id. Because the petitioner bears the burden of proof in the post-conviction court, an unsuccessful petitioner appeals from a negative judgment. Id. A party appealing a negative judgment must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the trial court. Id.

Stults, who proceeds pro se, argues that he received ineffective assistance of appellate counsel for a variety of reasons. When evaluating an ineffective assistance of counsel claim, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). Carter v. State, 929 N.E.2d 1276, 1278 (Ind. 2010). As for the first prong, we presume that counsel provided adequate representation. Pruitt, 903 N.E.2d at 928. Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord deference to those decisions. Id. The second prong requires a showing that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id.

"Ineffective assistance of appellate counsel claims fall into three categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well." Carter, 929 N.E.2d at 1278. All of Stults's claims essentially fall into the waiver of issues category.

Unique to our analysis of ineffective assistance of appellate counsel claims, appellate counsel's performance regarding the selection and presentation of issues will be presumed adequate unless found unquestionably unreasonable considering the

information available in the trial record or otherwise known to appellate counsel. Pruitt, 903 N.E.2d at 928 n.37. To prevail on an ineffective assistance of appellate counsel claim, a defendant must show from the information available in the trial record or otherwise known to appellate counsel that appellate counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy. Id.

I. Ineffective Assistance of Trial Counsel

Stults argues that Oliver should have argued on direct appeal that he was ineffective for failing to raise certain issues during trial. Stults asserts that Oliver, as appellate counsel, should have argued that Oliver, as trial counsel, was ineffective for failing to challenge the search of Stults's uncle's house, where Stults fled to and hid from police when they arrived on the scene, and for failing to challenge the search of the camper, where the incident occurred. Stults also contends that Oliver, as appellate counsel, should have argued that Oliver, as trial counsel, was ineffective for failing to lay an adequate foundation for the admission of a videotaped interview of B.-D.

Although a defendant is not prohibited from raising an issue of ineffective assistance of counsel claim on direct appeal, a post-conviction proceeding is usually the preferred forum for adjudicating claims of ineffective assistance of counsel. Rogers v. State, 897 N.E.2d 955, 964 (Ind. Ct. App. 2008), trans. denied. This is because such claims often require the development of new facts not present in the trial record. Id. at 964-65. "Although a defendant may choose to present a claim of ineffective assistance of

counsel on direct appeal, if he so chooses, the issue will be foreclosed from collateral review." Id.

Even more troubling is the fact that Stults contends that Oliver should have raised the issue of his own ineffectiveness. As our supreme court recently explained, "[a]rguing one's own ineffectiveness is not permissible under the Rules of Professional Conduct." Caruthers v. State, 926 N.E.2d 1016, 1023 (Ind. 2010) (citing Ind. Professional Conduct Rule 1.7). "Because trial counsel are poorly positioned to critique their own performance or to proclaim it deficient, a defendant should not be foreclosed from ever having a fresh set of eyes consider and argue the effectiveness of his or her trial counsel." Etienne v. State, 716 N.E.2d 457, 463 (Ind. 1999). Although there may be circumstances in which an ineffective assistance of counsel claim is sufficiently clear that immediate review is appropriate, under most circumstances we will not entertain a claim of ineffectiveness of counsel presented on appeal by the same attorney who tried the case. Etienne, 716 N.E.2d at 463.

Stults does not direct us to anything indicating that immediate review of the claims was appropriate. Because we would not have entertained the ineffective assistance of counsel claims if they had been raised by Oliver on direct appeal, Stults has not established the decision not to raise them was unreasonable.

II. Double Jeopardy

Stults argues that Oliver should have raised a double jeopardy issue on direct appeal because his convictions for criminal deviate conduct and criminal confinement

violate double jeopardy. Stults claims that the jury used the same facts to support his criminal deviate conduct and confinement convictions.

Our supreme court has observed, "[c]ertainly, one who commits rape or criminal deviate conduct necessarily 'confines' the victim at least long enough to complete such a forcible crime." Gates v. State, 759 N.E.2d 631, 632 (Ind. 2001). The Gates court determined whether Gates's convictions for rape, criminal deviate conduct, and confinement violated double jeopardy. The court stated, "[w]ithout pausing to elaborate on the statutory or constitutional frameworks, Gates' entitlement to relief depends upon whether the confinement exceeded the bounds of the force used to commit the rape and criminal deviate conduct." Gates, 759 N.E.2d at 632. The court concluded that because Gates's tying the victim's hands behind her back with twine was not a necessary part of the rape or criminal deviate conduct, the confinement was an independent crime.

Here, although the charging information and jury instructions did not specify what facts the charges were based on, the evidence adduced at trial clearly shows two independent crimes. The confinement charge alleged that Stults "did knowingly confine another person . . . without [her] consent." App. p. 12. The State's confinement case was based in part on Stults not allowing B.-D. to go home when they were driving around together. Stults specifically testified that at one point B.-D. even tried to hotwire her own car. The prosecutor questioned Stults as follows:

> Q. Now, sir, you mentioned that [B.-D.] was trying to hot-wire the car when she was out in Middletown?
>
> A. Yes.

Q. Okay. Why was she trying to do that?

A. So she could leave there.

Q. Who had the keys? You had the keys, didn't you?

A. I had them in my right pocket, yes.

Q. [B.-D.] wanted to leave pretty bad, didn't she?

A. She wanted to leave, yes.

Q. She wanted to leave bad enough that she tried to hot-wire the car to get out of there, didn't she?

A. Yes.

Exhibits p. 449. During the closing argument, the prosecutor pointed to this evidence to explain the crime of confinement. These facts support the conclusion that the confinement conviction is separate from the criminal deviate conduct conviction.

Even though the evidence showed and the prosecutor argued that B.-D. was confined during the sexual encounter, because of the ongoing nature of the confinement, Stults has not shown a clear double jeopardy violation. Oliver's decision not to pursue this argument on direct appeal was not unquestionably unreasonable.

III. Consent Instruction

Stults contends that Oliver was ineffective because he did not argue on direct appeal that the trial court committed fundamental error when it rejected his consent instruction. At the post-conviction hearing, Oliver testified that he did not raise this issue in part because:

> it was argued anyway during closing argument and the jury came back with an acquittal on the issue of forced sex which

> is more commonly known as rape. So ancillary to that, I did not want to see myself being in a position of arguing to the Court of Appeals nor the Indiana Supreme Court that anybody by law in the State of Indiana could of [sic] consented to having their rectum ripped. I didn't want to argue that because I didn't think it would get me anywhere.

Tr. pp. 96-97. Oliver's decision not to pursue the issue of the consent instruction on direct appeal was explained by reasonable strategy. This claim of ineffective assistance of appellate counsel fails.

IV. Sufficiency of the Evidence

Stults argues that Oliver was ineffective for failing to challenge the sufficiency of the evidence to support the Class A felony criminal deviate conduct conviction on direct appeal. For purposes of this case, a person who knowingly or intentionally causes another person to perform or submit to deviate sexual conduct when the other person is compelled by force or imminent threat of force commits criminal deviate conduct. Ind. Code § 35-42-4-2. The offense is a class A felony if it results in serious bodily injury to any person other than a defendant. Id. Deviate sexual conduct includes the penetration of the anus of another person by an object. I.C. § 35-41-1-9(2). Stults argues there was insufficient evidence of serious bodily injury and force or the threat of force.

Serious bodily injury is bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement, unconsciousness, extreme pain, permanent or protracted loss or impairment of the function of a bodily member or organ, or loss of a fetus. I.C. § 35-41-1-25. At trial, B.-D. testified when Stults inserted something into her rectum she "felt the most intense pain in [her] rectal area." Tr. p. 167. She stated, "[i]t

was the most horrible pain I've ever felt in my rectal area." Id. B.-D. testified, "This object felt like somebody stuck a pipe up my butt." Id. at 168. She went on to testify, "I had pain clear up into my abdomen. It felt like it split me open rectally. I just felt like I was torn open. It felt like it perforated, went through the inside of the bowel and inside of me." Id. She was bleeding, thought she was seriously injured, and asked Stults to call an ambulance.

At the emergency room, B.-D. had difficulty walking and had to be given a sedative so the area could be cleaned. The doctor who provided B.-D.'s follow up care testified that she suffered a one inch laceration near her rectum. He testified that he prescribed hydrocodone and Darvocet over the course of her treatment to manage her pain. He stated that B.-D. had difficulty walking and sitting on the exam table four days after she was treated in the emergency room and required follow-up care for approximately one month.

Stults's challenge to the serious bodily injury is nothing more than a request to reweigh the evidence. As such, this claim would not have been successful on direct appeal. See Jackson v. State, 925 N.E.2d 369, 375 (Ind. 2010) (observing that, in addressing sufficiency of the evidence claims, we do not reweigh the evidence or judge the credibility of the witnesses, and we respect the jury's exclusive province to weigh conflicting evidence). Oliver's decision not to pursue this issue on direct appeal was a matter of reasonable strategy and was not ineffective assistance of counsel.

As for Stults's claim that there was insufficient evidence of force, he argues, "the sexual deviance occurred during the commission of the crime of rape for which Stults

were [sic] aqquitted [sic]." Appellant's Br. p. 46. Stults contends that because he was acquitted of the rape charge, apparently because B.-D. consented to the intercourse, B.-D. was not compelled by force to submit to the deviate sexual conduct. B.-D. testified that, although she initially agreed to have sex with Stults, during the encounter she changed her mind and said, "No more. Stop it. This is enough. Get off me." Tr. p. 162. At that point, the two struggled. B.-D. pushed, smacked, and kicked Stults to get him off of her. She stated that after she kicked him she ended up sideways on the bed and that "[h]e had one arm on [her] leg holding [her] leg up while he did the rectal thing." Id. at 170.

From this evidence the jury could infer that, even if B.-D. initially consented to sexual intercourse, she did not consent to the deviate sexual conduct and that Stults used force to compel B.-D. to submit to the deviate sexual conduct. The jury was free to reject Stults's testimony that he inserted his finger into her rectum as part of a consensual encounter and accidentally scratched her with his fingernail. This claim of insufficient evidence would not have been successful on direct appeal. See Jackson, 925 N.E.2d at 375. Oliver's decision not to pursue this issue on appeal was a matter of reasonable strategy and did not amount ineffective assistance of counsel.

Conclusion

Stults has not established that he received ineffective assistance of appellate counsel. The post-conviction court properly denied his petition for post-conviction relief. We affirm.

Affirmed.

FRIEDLANDER, J., and CRONE, J., concur.